United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-2095

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FOR THE SECOND CIRCUIT

ASSATA SHAKUR a/k/a JoANNE CHESIMARD, :

Appellant, :

-against-

BENJAMIN MALCOLM, individually, and as Commissioner of Correction of the City of New York: JOSEPH D'ELIA, individually, and as Director of Operations, Department of Correction, City of New York; ESSIE MURPH, Superintendent, New York City Correctional Institution for Women, :

Appellees. :

B
P/S

APPELLANT'S REPLY BRIEF

Respectfully submitted,

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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ARGUMENT

APPELLEES HAVE UNCONSTITUTIONALLY RESTRICTED APPELLANT'S RIGHT OF ACCESS TO THE COURTS AND TO HER ATTORNEYS.

The primary issue on this appeal is whether the denial by the Department of Correction of appellant's request for para-professionals employed by her attorneys to interview her under conditions of confidentiality and privacy, places an unconcionable burden on her Sixth and Fourteenth Amendment right to obtain legal assistance to seek redress for the deprivation of her constitu-

tional rights in violation of Procunier v. Martinez, 416 U.S. 396, S. Ct. 1800 (1974). Appellees, under the guise of discussing the appeal ability of the District Court's order under Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949) actually argue the merits of the substantive issue.

The Sixth and Fourteenth Amendment issues presented are of fundamental importance to incarcerated litigants right of access to the courts and to their attorneys. Yet, no Court of Appeals except the First Circuit, Sousa v. Travisono, 498 F 2d 1120, (1st Cir. 1974) aff'd 368 F. Supp. 959 (D., R.I. 1973), has considered the implications of the Procunier decision. The issues raised are indeed "serious and unsettled" Cohen, supra., 337 U.S. at 547.

A. The Unconcionable Restrictions and the Lack of a Reasonable Alternative.

The issues before the Court involve the power of the Department of Correction to hinder and obstruct appellant's right of access to her attorneys and to the courts in litigation charging the Department with substantial violations of her constitutional rights. Even accepting appellees' formulation of the Cohen rule as set forth in Kohn v. Royall, Koegel and Wells, 496 F 2d 1094 (2nd Cir., 1974), that question implicates Bronx Legal Services' ability to represent its client, and of necessity "affects an issue fundamental to the further conduct of the case." (Appellee's Br. p. 11).

Appellees denigrate the merits of appellant's claim by discussing her right of access as if the underlying litigation were an ordinary civil action with no constitutional dimension. However, substantial constitutional violations are alleged. Thus, she must be accorded the same access to the attorneys representing her as if those attorneys represented her in defense of criminal charges. Procunier, supra, 94 S. Ct. at 1814.

Appellees' argument that the present case is not within Procunier because the ban is not absolute misreads Procunier and misinterprets the present facts. In Procunier only one category of para-legal was barred absolutely, i.e., those working for attorneys, while certain law students were permitted access. 94 S. Ct. at 1815. Thus, for the ban to be absolute, it is not necessary that all para-legals be barred. It is sufficient if the prohibition extends to all persons of a particular class.

That is precisely the situation here. In terms of the resources available to appellant and her attorneys, there is a blanket prohibition against para-legals conducting attorney type interviews with her. The record belies the Department of Correction claim that it neither "intends or desires" to reject every para-legal designated by Bronx Legal Services. (Appellee's Br., p. 14). Eight names have been sumbitted to the Department and each one has been rejected. Appellant and her attorneys are not required to scour the countryside in search of a person who may be acceptable to appellees.

Even if the ban were not absolute, any restriction on appellant's right of access to her attorneys or their staff must be premised on a showing of past abuse of the right. Sostre v. McGinnis, 442 F. 2d 178, 200 (2nd Cir., 1971) and must be accompanied by reasonable alternatives to assure that the right of access remains unobstructed. Johnson v. Avery, 393 U.S. 438 (1969). Gilmore v. Lynch, 319 F. Supp. 105 (N.D., Cal., 1971) aff'd. sub. nom. Younger v. Gilmore, 404 U.S. 15 (1971).

Appellees do not claim past abuse of the right of access. There is no evidence that appellant has abused her access to any attorney, criminal or civil. Moreover, it is uncontroverted that the three para-professionals have conducted attorney type interviews at Rikers Island without incident as late as the day before the hearing on the instant motion. (31a, 5).

Most important, there is no reasonable alternative to the relief sought. Interviews by telephone through a glass partition are unacceptable for the reasons stated at appellant's Main Br., p. 10 - 11. Appellees suggest that "appellant can employ other, presumably equally competent investigators" (Appellee's Br., p. 13) and inaccurately state that "none of the three possess any particular qualifications for their appointment as investigators." (Appellees' Br., p. 6). These suggestions are misleading, and if allowed to prevail, will seriously interfere with appellant's right to retain attorneys of her own choosing.

Appellant retained Bronx Legal Services to represent her in this civil rights action. Presumably that decision was

made in reliance on the skill and expertise of the attorney who would conduct the litigation, and with knowledge of Bronx Legal Services resources, including the supporting staff and available paralegals. The Department of Correction has no right or power to tell appellant that her reliance is misplaced and that she must retain counsel suitable to them. Such arrogance is an unconcionable interference with her right of access to the courts. Johnson v. Avery, supra.

Moreover, it is not the Department's function to review the qualifications of Bronx Legal Services employees. Ms. Smith, Ms. Shakur and Mr. LaBorde were employed as para-professionals ("Legal Services Assistants") (34a, 36a, 38a) and presumably possessed the requisite qualifications at that time. It is sufficient that they are performing their duties in a manner satisfactory to their employer.

Nor does the Department of Correction have the right to require Bronx Legal Services to hire para-professionals other than those already on staff. The plain fact is that Ms. Smith, Ms. Shakur and Mr. La Borde are the only para-professionals available to assist in prisoners' rights litigation, andhave been doing so for more than one year. Absent a showing of past abuse of interviewing conditions and facilities, the Department of Correction cannot prohibit them from continuing to perform those duties. Sostre v. McGinnis, supra.

B. The Irreparable Harm

It bears repeating that the right of access to the Courts, and the right to the assistance of counsel to facilitate that access is one of the fundamental rights retained by prisoners. (Cases cited Appellant's Main Br., pp. 8-9). When a prisoner petitions the Federal Courts to redress constitutional violations committed by her jailers, the exercise of her right of access is effective only during the pendency of the litigation. The harm flowing from inadequate consultation during the pretrial stages and from insufficient trial preparation resulting from an unconstitutional interference with the right of access to attorneys cannot be cured at the appellate stages. For example, this court cannot adequately review whether a deposition failed to elicit certain relevant information because there was no opportunity to consult with the prisoner before the deposition. Nor can this court review whether documents were properly analyzed, affidavits properly drawn or witnesses properly prepared.

The time spent confined under unconstitutional conditions because the attorneys cannot utilize their full resources is lost to appellant irrevocably and irretrievably. Review of this issue after a determination of the merits will occur at a time when, because the action is terminated, the right, even if vindicated by the Appellate court will be rendered moot. By that time appellant's rights "will have been lost, probably irreparably."

Cohen, supra, 337 U.S. at 546.

CONCLUSION

The record in open court is devoid of any showing to warrant the absolute prohibition against Bronx Legal Services para-legals conducting attorney type interviews with appellant. Because there is no reasonable alternative to the access sought, and because there is no room for "ex-parte determinations on the merits of cases in civil litigation," Kinoy v. Mitchell, 70 Civ. 5698 (S.D.N.Y., June 3, 1975) sl. op. 22, the order appealed from should be reversed.

Respectfully submitted,

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